Howard Industries, Inc. *and* International Brotherhood of Electrical Workers, Local 1317. Cases 15–CA–070830, 15–CA–081543, and 15–CA–085642

May 13, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On June 13, 2013, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order as modified and set forth in full below.[1]

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with requested information, including time studies, that related to the setting of production standards and that was relevant and necessary for the representation of bargaining unit employees in the grievance and arbitration process. For the reasons set forth below, we reject the Respondent's arguments and adopt the judge's finding of a violation.

Facts

The Respondent maintains a facility in Laurel, Mississippi, that produces coils for its manufacture of electrical transformers. For each custom designed coil, the Respondent sets production standards detailing the steps necessary to manufacture each coil to specification and the corresponding time required for an employee to complete each step. Employees are evaluated on their efficiency and are written up if they fall below 90 percent efficiency. They face demotion or termination after a third write up in 6 months.

After determining that unit employees were greatly exceeding their efficiency ratings, the Respondent concluded that the production standards were outdated and required revision. In July 2010, the Respondent issued a memo to employees advising them that, as of October 1, 2010, coil winding standards would change. Upon being informed of the impending change in standards, the Union requested information related to the new and original standards and how they were set. Over the next 2 years, the Union continued to request information concerning the standards against which employees would be evaluated. In its correspondence to the Union, the Respondent maintained that the requested information involved the steps and times required to wind each coil and refused to provide the information on the grounds that it was proprietary and constituted trade secrets. It instead offered the Union the opportunity to visit the facility and view the coil winding process. The Union refused this offer and the Respondent failed to supply any of the requested information.

Judge's Decision

The judge first found that the requested information was presumptively relevant because the production standards were used as a basis for disciplining employees, and the Union needed to be able to challenge their reasonableness, if appropriate, in representing employees in grievance/arbitration proceedings. *General Motors Corp.*, 257 NLRB 1068 (1981), enfd. 700 F.2d 1083 (6th Cir. 1983). Analyzing the case under *Northern Indiana Public Service Co.*, 347 NLRB 210 (2006), the judge concluded that the Respondent did not demonstrate that it had a legitimate and substantial interest in keeping this relevant information confidential. He rejected the Respondent's claim that records showing the steps of the manufacturing process and the amount of time needed to complete each step reveal a unique manufacturing process that allows it to wind more than one coil at a time and thus constitutes a trade secret. He further found that the Respondent did not demonstrate that it otherwise departs from the general practices in the industry. In addition, the judge found that, even assuming the Respondent had established a confidentiality interest, that

[1] We shall modify the judge's recommended Order to conform to the Board's standard remedial language for the violations found. We shall substitute a new notice to conform to the Order as modified and with *Durham School Services*, 360 NLRB No. 85 (2014).

interest was insufficient to outweigh the Union's need for the information because: (1) the Respondent does not use technology unknown in the transformer industry; (2) the Respondent does not use a secret method to assemble transformers that differs from other manufacturers;[2] (3) the record did not establish that disclosure would place the Respondent at a significant competitive disadvantage; and (4) employees were already aware of the steps in assembling a particular transformer. Finally, the judge found that even if the Respondent had a strong interest in confidentiality, it had an obligation to seek an accommodation and failed to do so.

Analysis

It is well established that a union has a right to information that is relevant and necessary for the purposes of negotiating and administering a collective-bargaining agreement. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967). When a union requests relevant but assertedly confidential information,[3] the Board balances the union's need for the information against any "legitimate and substantial confidentiality interests established by the employer." *Detroit Edison v. NLRB*, 440 U.S. 301, 315, 318–320 (1979). The party asserting confidentiality has the burden of proving that it has a legitimate and substantial confidentiality interest in the information sought, and that such interest outweighs its bargaining partner's need for the information. *Washington Gas Light Co.*, 273 NLRB 116, 116 (1984); *Northern Indiana Public Service Co*., supra at 211. When a party is unable to establish confidentiality, no balancing of interests is required and it must disclose the information in full to the requesting party. *Detroit Newspaper Agency*, 317 NLRB 1071 (1995); *Lasher Service Corp.*, 332 NLRB 834, 834 (2000). See generally *Bud Antle*, 359 NLRB No. 140, slip. op at 9 (2013) (union grieving subcontracting of unit work entitled to requested information on contracts, production, and locations where work performed, etc., where employer failed to substantiate claim that information was trade secret and proprietary); *Bridge, Structural & Ornamental Ironworkers Local 207 (Steel Erecting Contractors),* 319 NLRB 87, 91 (1995) (union that failed to establish that requested information on apprentices' wages and dues was proprietary was ordered to disclose information).

Conversely, where a claim of confidentiality is adequately established, it may be a valid basis for declining to fully produce the requested information. However, the party asserting this confidentiality claim cannot simply refuse to furnish the information. Rather, it has a duty to come forward with an offer to accommodate the request and engage in bargaining to seek a resolution that addresses both parties' needs. See *Tritac Corp.*, 286 NLRB 522, 522 (1987); *Pennsylvania Power Co.*, 301 NLRB 1104, 1105–1106 (1991).

In accordance with these principles, the Respondent had the burden of demonstrating a legitimate and substantial confidentiality interest in the requested documents. The judge found that it failed to satisfy that burden. The Respondent argues that the judge placed too much emphasis on the testimony of Vice President of Human Resources Loren Koski, who responded to the Union's information requests, and not enough on the testimony of Vice President of the Single-Phase Pad Division Jack Delk, who is an engineer. We find that, even duly considering Delk's testimony, the Respondent failed to demonstrate how the records showing the steps of the manufacturing process and the amount of time it should take to complete each step would reveal confidential or proprietary information.[4] Delk testified that the process

[2] The judge occasionally refers to transformers where the product at issue is the coils, which are a component of the transformers.

[3] Confidential information is limited to a few general categories, including information which would reveal substantial proprietary information, such as trade secrets. *The Southern New England Telephone Co.*, 356 NLRB No. 62, slip op. at 7 (2010). Trade secrets include "formulas, devices, or compilations of data, reasonably calculated to provide their possessor with some business advantage over competitors[.]" *Borden Chemical*, 261 NLRB 64, 82 (1982), enfd. sub nom. *Oil, Chemical & Atomic Workers Local Union No. 6–418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983).

[4] In addition to the time studies, the Respondent argues that its software, which it alleges designs optimal custom coils, is also proprietary. The Respondent asserts that if competitors obtain the time studies for a sufficient number of coils, they could, through reverse engineering, replicate the software and undercut the Respondent's market advantage. As with the time studies, the Respondent failed to establish a substantial and legitimate confidentiality interest in the software, stating only that the Respondent designed it and asserting that it enables the Respondent to produce optimal coils for efficient transformers at the lowest cost. Further, the Respondent has failed to demonstrate how the time studies would allow a competitor to duplicate the software and thus the Respondent's design process. Contrary to our colleague, we find that the Respondent's general assertions, supported only by vague testimony, are insufficient to establish a substantial and legitimate

by which the coil is manufactured matters in terms of cost efficiency and the quality of the product, and that if competitors obtained the time studies, they would be able to discover and duplicate its process for certain coils by "[working] backwards and [building the] coil." However, the Respondent failed to demonstrate through Delk's testimony that competitors do not follow the same steps when creating similar coils or that its coils actually differ in nature from those of its competitors. Instead, the Respondent relies on its assertion that it holds 40 percent of the market as evidence that it manufactures coils differently from its competitors. In sum, the Respondent failed to make a particularized demonstration of why the time studies would "trigger specific confidentiality concerns." *Mission Foods*, 345 NLRB 788, 792 (2005). Accordingly, we agree with the judge that the Respondent failed to demonstrate a legitimate and substantial confidentiality interest in the time studies and therefore violated Section 8(a)(5) and (1) by withholding them from the Union.[5]

Further, even if the Respondent had demonstrated that the information was confidential, it was nevertheless obligated to seek an accommodation of the Union's need for the information through bargaining. The Respondent's argument that it satisfied this obligation by offering the Union a tour of the facility fails. The offer was not reasonable, as it was neither responsive to the Union's request for information related to the formulation of production standards nor an adequate means of conveying that information. Accordingly, even assuming arguendo that the requested information was confidential, the Respondent violated Section 8(a)(5) and (1) because it failed to seek an accommodation as required under the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Howard Industries, Inc., Laurel, Mississippi, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Failing and refusing to furnish information requested by the Union which is relevant to and necessary for the performance of the Union's duties as exclusive representative of Respondent's bargaining unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union, in a timely manner, the information which the Union requested on August 3 and 18, 2010, pertaining to Respondent's setting of production standards and quotas for bargaining unit employees.

(b) Within 14 days after service by the Region, post at its Laurel, Mississippi facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 3, 2010.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the

---

confidentiality interest in the software or the time studies. *Detroit Newspaper Agency*, supra at 1073–1074.

[5] Because we adopt the judge's finding that the Respondent has not demonstrated a legitimate and substantial confidentiality interest in the requested information, we do not reach the subsequent analytical step of weighing that interest against the Union's need for the information. Therefore, we need not rely on: (1) the judge's implication that employee knowledge of an allegedly confidential process weakens an employer's confidentiality claim; or (2) his suggestion that in order to show a high interest in confidentiality, the Respondent had a burden to establish that the disclosure of the time studies would place it at a significant competitive disadvantage.

As the General Counsel asserts, the Respondent failed to turn over any information in response to the Union's request. Accordingly, as the judge found, the Respondent must furnish the Union with all requested relevant and necessary information. See, e.g., *Lasher Service Corp.*, supra at 834 .

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 13, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa , Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, concurring and dissenting.

I dissent insofar as I find that the Respondent's evidence, while somewhat generalized in presentation, was sufficient to establish that the Respondent had a legitimate and substantial confidentiality interest in both the individual time studies and the algorithm used by its unique "software system" to determine its customized coil builds generally. The evidence shows that the time studies are information demonstrating a manufacturing process involving multiple components and their sequencing, their disclosure to a competitor would be of significant economic value because they would allow a competitor to determine the most time efficient way to build a particular coil, their contents are not generally known or discoverable, and the Respondent has taken reasonable efforts to maintain their secrecy. Moreover, the algorithm that ultimately provides the competitive advantage behind Respondent's manufacturing process, and is of even greater value to Respondent, could be reverse engineered once a third party reviewed enough time studies to deduce the overall logic used to manufacture coils as efficiently as Respondent apparently does—efficiently enough to have garnered a 40 percent share of the national market.

However, Respondent failed to attempt to accommodate the Union's indisputable need for the information with Respondent's confidentiality interest other than offering a plant tour that would not provide any particular time study information to the Union. Accordingly, I concur in finding that the Respondent violated Section 8(a)(5) for the sole reason that it failed to seek an accommodation of the Union's legitimate need for the confidential information in bargaining. To remedy this violation, I would direct the Respondent to engage in the necessary accommodation bargaining. E.g., *Exxon Co., USA*, 321 NLRB 896, 899 (1996), enfd. mem. 116 F.3d 1476 (5th Cir. 1997).

Dated, Washington, D.C. May 13, 2014

Harry I. Johnson, III, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively with the International Brotherhood of Electrical Workers, Local 1317 by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL furnish to the Union in a timely manner, the information which the Union requested on August 3 and 18, 2010, pertaining to Respondent's setting of production standards and quotas for our bargaining unit employees.

HOWARD INDUSTRIES

The Board's decision can be found at www.nlrb.gov/case/15-CA-070830 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

Caitlin E. Bergo, Esq. and *Amiel J. Provosty, Esq.,* for the General Counsel.
Elmer E. White III, Esq. and *Josh C. Harrison, Esq. (The Kullman Firm),* of Birmingham, Alabama, for the Respondent.
Clarence Larkin, of Laurel, Mississippi, for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on April 3 and 4, 2013, in Ellisville, Mississippi. After the parties rested, I heard oral argument, and on May 3, 2013, issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The Conclusions of Law, Remedy, Order, and notice provisions are set forth below.

ADDITIONAL ANALYSIS

This further analysis should begin with a clarification of a paragraph in the bench decision. After noting that a union's waiver of the right to bargain about a particular subject does not also waive the union's right to receive information relevant to and necessary to perform its duty as the employees' representative, the decision continued, "even if an employer has a right to make a change unilaterally, that right does not affect its duty to provide information." Taken by itself, this statement sweeps too broadly.

Obviously, if a union has waived the right to bargain about a particular subject, it does not need information about that same matter *for the purpose of bargaining*. In this circumstance, where a union requests information to assist it in negotiating concerning a subject about which it no longer has the right to bargain, an employer has no duty to provide the information. See *Kennametal, Inc.*, 358 NLRB No. 68 (2012).

However, in the present case, the Union did not request information about the production standard to assist it in bargaining about the standard. Rather, it sought this information because management was using the production standard as a basis for disciplining employees and the Union represented those employees in grievance proceedings, including arbitrations. The Union has an ongoing right, and duty, to represent employees in such grievance matters and therefore the requested information remains relevant and necessary for that purpose.

Further, the record leaves no doubt that the requested information concerning the Respondent's formulation of performance standards was indeed both relevant and necessary for the Union to represent employees disciplined for failure to meet the standards. See *General Motors Corp.*, 257 NLRB 1068 (1981) (time studies which management used in setting production standards were relevant to the union's processing of grievances arising from application of those standards).

Because the requested information pertained to bargaining unit employees it was presumptively relevant, but even apart from that presumption, the Union clearly needed it. As discussed in the bench decision, in a grievance arbitration, the Union might well wish to argue that Respondent lacked "just cause" to take the disciplinary action. If management had set a production standard by whim or by pulling numbers out of a hat, the Union might well wish to argue an absence of just cause for the discipline.

Moreover, management changed the standard frequently because the work itself changed to meet the needs of particular customers. When a customer requested transformers built to a certain specification, the amount of time necessary to construct the transformer depended on the details of the specification.

Because management set a new production quota based on the particular requirements of each custom order, the reasonableness of the standard remained a live issue. A production standard for one job might indeed be reasonable, in which case the Respondent would have just cause to discipline an employee who failed to meet the standard. However, that did not necessarily mean that another production standard, set for another order at a later time also would satisfy an arbitrator considering a "just cause" issue.

For example, if the Respondent received a rush order, management might be tempted not to use its regular process for setting the standard but instead might make up an arbitrary quota. No issue concerning whether the Respondent took such a "short cut" is before me, and I do not suggest that Respondent ever did so. However, the Union has the right to explore this question when it represents an employee disciplined for failing to meet a standard. Only by receiving information about how the Respondent set standards could the Union determine whether it should make a "just cause" argument.

The Board has established a 3-stage process for analyzing a claim of confidentiality made in response to a request for information. *Northern Indiana Public Service Co.*, 347 NLRB 210 (2006). The same analysis applies whether the party requesting the information is the exclusive bargaining representative of the employees or the employer with which this union has a bargaining relationship. Here, I will describe the steps as they apply to the parties in this proceeding. In following this framework, I note that the party asserting a confidentiality claim, in this case the Respondent, bears the burden of proving it. *Lasher Service Corp.*, 332 NLRB 834 (2000).

Respondent has asserted that disclosure of the requested information would require revealing a trade secret. At the first

[1] The bench decision appears in uncorrected form at pp. 292 through 316 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as appendix A to this certification.

For clarity, it may be noted that the case caption, above, does not include all of the docket numbers which have appeared in various pleadings. An April 1, 2013 Order by the Regional Director for Region 15 severed Case 15–CA–019935. After hearing opened, the parties reached an agreement settling the allegations raised by the charges in Cases 15–CA–082078 and 15–CA–089002, resulting in an order approving the settlement agreement, severing these two cases, and remanding them to the Regional Office for supervision of Respondent's compliance with the terms of the agreement.

step, I must determine whether the Respondent has a legitimate and substantial confidentiality interest in the information sought. If the Respondent fails to make such a showing, the analytical process stops at this first step. However, if the Respondent does show the existence of such a confidentiality interest, the analysis continues to the next stage.

At the second step, the Board must weigh the Respondent's interest in confidentiality against the Union's need for the information. If the balance does not favor confidentiality, the analysis stops at this point. However, if it does favor confidentiality, the analysis then focuses on whether the Respondent has sought an accommodation.

Following this analytical framework, I begin by asking whether the Respondent has a legitimate and substantial confidentiality interest in keeping the requested information confidential. That inquiry must begin by asking (if somewhat ungrammatically), "Exactly what information are we talking about?"

The record indicates that Respondent was concerned that disclosing records showing the steps of a manufacturing process and how much time it should take to complete each step would allow its competitors to reconstruct the process and duplicate it.

Although Respondent asserts that its manufacturing process uniquely winds more than one coil at a time, this information itself does not appear to be a trade secret. Additionally, Respondent has not established that it otherwise departs from the general practices in the industry. I cannot conclude that Respondent has some distinctive proprietary process that it is trying to shield from other manufacturers.

Therefore, I would conclude that Respondent has not demonstrated a legitimate and substantial interest in keeping some trade secret confidential. However, trade secrets are serious matters and the protection of them warrants serious consideration. Accordingly, to protect against the possibility that I am simply being obtuse, I will assume that Respondent has satisfied the first stage of the analysis and will proceed to the second.

At this step, I must weigh the Respondent's interest in confidentiality against the Union's need for the information. Although the Respondent states that its machines wind more than one coil at a time, it has not contended that the machines use technology unknown in the transformer industry or that bargaining unit employees use a secret method to assemble a transformer which differs significantly from the methods used by other manufacturers.

Respondent introduced a document called a "bill of labor" which bore the word "confidential" at the top. Using codes, it listed the steps in building a particular transformer. The record suggests that these codes are used as abbreviations rather than for encryption, and that engineers familiar with transformer design would be able to understand them.

During the cross-examination of Respondent's Vice President Jack Delk, the General Counsel asked whether the information on such a record would allow a competitor to "reverse-engineer" the Respondent's coil-winding machinery. Belk answered, "Well, they would know how long it took to make a coil based on this, and if they had their own machines and they thought, Hey, it's taking me twice as long than [sic] this, then I think I can improve my machine."

Even if the exact amount of time the Respondent took to manufacture a particular coil is secret, the record does not establish that disclosure of this information would place Respondent at a significant competitive disadvantage. Presumably, competitors already are trying to increase the speed of their machinery."

It is true that the records in question also show the sequence of steps in assembling a particular transformer. However, bargaining unit employees already are aware of these steps because they perform them. I conclude that the Respondent's interest in confidentiality of the requested information is not particularly high.

On the other hand, the Union's need for this information weighs heavily. Absent this information, the Union has little or no basis to argue to an arbitrator that the disciplinary action was not for "just cause" because it was based on a failure to meet an unrealistic standard. Therefore, I conclude that the Union's need for the information outweighs the Respondent's interest in confidentiality. Accordingly, Respondent has a duty to provide the requested information.

Complaint paragraph 9 alleges that since about October 14, 2011, Respondent has failed to provide the Union with sufficient information to bargain over its asserted confidentiality concerns relating to the coil time report and time study. I do not recommend that the Board find that this allegation constitutes a separate violation of Section 8(a)(5).

Under well-established Board precedent, if a party has a duty to furnish requested relevant information and asserts confidentiality as a justification for noncompliance, it has a duty to seek an accommodation. *National Steel Corp.*, 335 NLRB 747 (2001). Thus, in the present case, the Respondent had an obligation to come forward with an offer of accommodation.

However, the record does not establish that Respondent ever made an offer responsive to the Union's request and its stated need for the information. For example, it did not propose that union officials enter into an agreement to keep the information confidential. It did not suggest an agreement to limit who could see the requested documents, or to prohibit the making of copies or to require their return. Respondent also did not offer to furnish redacted copies of the documents.

Respondent did offer to let a union official view the production process to see how employees wound coils and put transformers together. It should have been obvious to Respondent that such observations of employees at work would not give the Union any information about how management set the production quota. The patently nonresponsive and essentially irrelevant nature of this proposed "accommodation" and the absence of any other proposal leads me to conclude that Respondent has not satisfied its duty to seek an accommodation.

Complaint Paragraph 9 focuses on this duty. However, rather than treating the Respondent's failure to propose a meaningful accommodation as a separate violation of Section 8(a)(5), I believe it is better to consider it merely as one aspect of Respondent's overall failure to furnish the information requested by the Union.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B.

Additionally, it must, without any further delay, furnish the Union with the requested relevant and necessary information, as described in the Complaint.

CONCLUSIONS OF LAW

1. The Respondent, Howard Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, International Brotherhood of Electrical Workers, Local 1317, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Charging Party is and has been the exclusive representative, within the meaning of Section 9(a) of the Act, of Respondent's full-time and regular part-time production and maintenance employees in a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish to the Charging Party information concerning the setting of production standards, as described above, which the Charging Party had requested and which was relevant to and necessary for the representation of bargaining unit employees in the grievance and arbitration process.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent did not engage in the unfair labor practices alleged in the consolidated complaint not specifically found herein.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

ORDER

The Respondent, Howard Industries, Inc., Laurel, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to furnish information requested by the Charging Party which is relevant to and necessary for the performance of the Charging Party's duties as exclusive representative of Respondent's bargaining unit employees.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Charging Party, without further delay, the information which Charging Party requested pertaining to Respondent's setting of production standards and quotas for bargaining unit employees, as described herein.

(b) Post at its facility in Laurel, Mississippi, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix B."[3] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010).

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated Washington, D.C. June 13, 2013

APPENDIX A

BENCH DECISION

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. I find that Respondent violated Section 8(a)(5) and (1) of the Act by failing to furnish information requested by the Union which was relevant to the Union's duty to represent bargaining unit employees and necessary for that purpose.

Procedural History

This case began on December 15, 2011, when the International Brotherhood of Electrical Workers, Local Union 1317 (which I will call the Union or the Charging Party) filed and served an unfair labor practice charge against the Respondent, Howard Industries, Inc. The National Labor Relations Board, Region 15, docketed this charge as Case 15–CA–019935. The Union amended this charge on February 26, 2011.

On December 15, 2011, the Union filed a charge against Respondent in Case 15–CA–070830 and served it the next day. The Union amended this charge on January 26, 2012, on February 24, 2012, and again on April 26, 2012.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

On May 22, 2012, the Union filed and served a charge against Respondent in Case 15–CA–081543.

On May 30, 2012, the Union filed a charge against Respondent in Case 15–CA–082078 and served it on Respondent the next day. It amended this charge on June 5, 2012.

On July 19, 2012, the Union filed and served a charge against Respondent in Case 15–CA–085642.

On September 5, 2012, the Union filed and served a charge against Respondent in Case 15–CA–082078.

On September 11, 2012, the Union filed and served a charge against Respondent in Case 15–CA–089002.

On September 27, 2012, the Acting General Counsel of the Board, by the acting Regional Director for Region 15, issued a consolidated complaint and notice of hearing in Cases 15–CA–070830, 15–CA–081543 and 15–CA–085642. On October 19, 2012, the General Counsel, by the Acting Regional Director for Region 15, issued an Order Further Consolidating Cases, consolidated complaint, and notice of hearing, which consolidated Case 15–CA–082078 with the other three.

On December 17, 2012, the Acting General Counsel, by the Acting Regional Director for Region 15, issued an Order Further Consolidating Cases, consolidated complaint and notice of

hearing which consolidated Case 15–CA–089001 with the four already-consolidated cases. On February 5, 2013, the Acting General Counsel, by the Regional Director for Region 15, issued an amendment to this consolidated complaint and notice of hearing. For brevity, I will refer to this consolidated complaint, as amended, simply as the "complaint."

On March 19, 2013, the Acting General Counsel, by the Regional Director for Region 15, issued an Order Severing Case 15–CA–019935 and reissuing complaint in that matter.

On March 20, 2013, the Acting General Counsel, by the Regional Director for Region 15, issued an Order Consolidating Cases in Cases 15–CA–019935, 15–CA–070830, 15–CA–081543, 15–CA–082078, 15–CA–085642, and 15–CA–089002.

On April 1, 2013, the Acting General Counsel, by the Regional Director for Region 15, issued an Order Severing Case 15–CA–019935 and withdrawing complaint in Case 15–CA–019935.

On April 3, 2013, a hearing opened before me in Ellisville, Mississippi. Thereafter, the parties reached an agreement which settled the allegations raised by Cases 15–CA–082078 and 15–CA–089002. After reviewing that agreement, I concluded that it was consistent with the provisions and policies of the Act and stated on the record that I would issue an order approving the settlement agreement and severing these two cases from the consolidated proceeding. Such an order has issued.

Because of the partial settlement agreement, the Acting General Counsel orally amended the complaint on the record during the hearing. The effects of this amendment will be discussed below.

The parties presented evidence on April 3 and 4, 2013. After all sides had rested, I adjourned the hearing until May 2, 2013, when it resumed by telephone conference call so that counsel could present oral argument. After those arguments, I adjourned the hearing until today, May 3, 2013, and now issue a bench decision.

Admitted Allegations

Respondent timely answered the complaint. Based on the admissions in that answer, I find that the Acting General Counsel has proven the allegations raised in complaint paragraphs 1, 2, 3, 4, 5, 6, 7(a), 8(a) and (b). Respondent's answer also admitted the allegations raised by complaint subparagraph 8(c), but after the hearing opened, the parties reached an agreement to settle some of the allegations and, because of this settlement, the Acting General Counsel amended the complaint to delete subparagraph 8(c).

The partial settlement will be discussed further below. However, for clarity, I first will summarize the findings resulting from the admissions in Respondent's answer.

APPENDIX A

Specifically, I conclude that the government has proven the filing and service of the unfair labor practice charges, as alleged in complaint paragraph 1.

Additionally, I find that the Acting General Counsel has established that Respondent is an employer engaged in commerce within the meaning of the Act, that it is subject to the Board's jurisdiction and meets the Board's standards for the exercise of its jurisdiction, as alleged in complaint paragraphs 2, 3, and 4.

Further, I find that at all material times, Lauren Koski was Respondent's vice president of human resources and, in that position, was Respondent's supervisor and agent within the meaning of Section 2(11) and (13) of the Act, as alleged in complaint paragraph 6.

Additionally, I find that at all material times, the Union has been and is a labor organization within the meaning of Section 2(5) of the Act, as alleged in complaint paragraph 5. Based on Respondent's answer and on a stipulation received at hearing, I find that at all material times, the Union has been and is the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of the following unit of employees, which is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

Included:	All full-time and regular part-time production and maintenance employees.
Excluded:	All other employees, guards, and supervisors as defined by the Act.

Based on the admissions in Respondent's answer, I find that since about October 14, 2011, the Union has requested orally and in writing that Respondent furnish the Union with the coil time report and the time study report for coil winders, and that since about October 14, 2011, the Union has requested orally that Respondent furnish the Union with the information necessary to interpret the coil time report.

Oral Amendment to Complaint

As already noted, because of the settlement agreement in Cases 15–CA–082078 and 15–CA–089002, the Acting General Counsel orally amended the complaint to delete the allegations covered by the settlement. Specifically, this amendment with-

drew from the complaint the allegations in complaint subparagraph 8(c), and modified subparagraph 8(g) by deleting the reference to subparagraph 8(c).

The amendment withdrew complaint paragraphs 10, 11, and 12 in their entirety. It also modified complaint paragraph 13 by deleting references to these complaint paragraphs. As so modified, complaint paragraph 13 alleges only that Respondent, by the conduct alleged in complaint paragraphs 8 and 9, has been failing and refusing to bargain collectively and in good

APPENDIX A

faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

Facts

Respondent makes a wide variety of electrical transformers, and the manufacturing process requires winding many different types of coils. For years, management used a set of production standards to gauge the efficiency of the bargaining unit employees who wound the coils. Respondent's vice president of human resources testified that at one point, according to the existing standards, the employees were working at 140 percent efficient.

When Respondent's managers saw the 140 percent efficiency rating, they decided that the production standards were out of date. Respondent places high importance on using cutting edge technology, but the existing standards did not take into account the increase in productivity resulting from this technology but instead specified how quickly an employee should be able to wind a coil using older machinery. Therefore, management decided to adopt new standards.

The standards did more than state the time required for an employee to wind a complete coil. They also set the expectations for how long it should take to complete various steps in the coil-winding process. By July 26, 2010 memo to the coil winding employees, management announced the new standards:

> In order to continue to meet our customer's present and future needs and to remain competitive we have to constantly work towards improving the efficiency and quality of our work to help achieve these goals the standards for coil winding have changed. The quota percentage has not changed and will remain at 90%. You will have time to adjust to these new standards for the next two months. Take this time to prepare thoroughly for these changes. If during that time you need extra training contact your supervisor and extra training will be made available. On October 1, 2010, you will be expected to meet quota using the new standards.

By August 3, 2010 letter, the Union requested that Respondent furnish both the old standards and the new ones. Respondent replied by fax with a one-paragraph letter dated August 17, 2010 which stated:

> The standard for winding coils is to do 100% of the daily quota, but currently we refrain from doing discipline until an employee has fallen below 90% average over a period of time. It has been this way before July 26th and is after July 26th.

Union President Clarence Larkin credibly testified that he did not know what the daily quota was and had never been told what the daily quota entailed. The next day, Larkin sent Respondent a letter requesting a "copy of the method being used to determine how many coils

APPENDIX A

that a coil winder is supposed to wind within a regular work day of eight (8) hours as a regular work day is defined under Article III, Section 3 and 10 of the collective bargaining agreement."

By September 2, 2010 letter, Human Resources Vice President Koski replied to the Union's request. This letter stated as follows:

> The methods and standards are proprietary information that we secure and can not have released to anyone as it ensures competitive advantage in the market. These secrets are trade secrets and must be protected. The Company would be willing to review our standard of any individual coil and if we find that it is out of line we will modify it to conform to our standards. Upon determining if it is out of line we will then inform the union or employee that the standard has been changed. If we determine that it is in line then we will continue to use the standard and the employee will be expected to produce the coils within the allotted time.
>
> What gives us the right to make changes is the contract between Howard Industries, Inc and the IBEW specifically the management rights article.
>
> Here are some excerpts for your information, "Except as specifically abridged, delegated, granted, or modified by this Agreement, or any supplementary agreements that may hereafter be made, all the rights, powers, and authority the Company possessed prior to the signing of this Agreement are retained by the Company and remain exclusively and without limitation within the Rights of management, nor does the exercise thereof require any prior discussion or negotiation with the Union." It goes on to say, ". . . Such rights of management include, among other things, but are not necessarily limited to, the right to . . . determine methods of work measurement and to establish standards of performance. . . ."
>
> I hope that this has answered the questions you have posed as well as clarified our position on coil production methods. As for the standards the employees will still be expected to make and maintain an average of 90% of their quota after the adjustment period has ended.

Before continuing with the chronology of events, it is appropriate to make the following observations about the Respondent's September 2, 2010 letter and its stated reason for refusing to provide the requested information.

Respondent invoked an exception the Board and courts have made to the general principle that an employer's duty to bargain in good faith with the exclusive representative of its employees includes a duty to furnish, at the union's request, information relevant to the union's representation duties and necessary to perform that function. Under certain circumstanc-

es, this

APPENDIX A

narrow exception relieves an employer from the obligation to furnish such information when it constitutes a "trade secret."

Typically, when an employer asserts that certain requested information is a trade secret which need not be disclosed, that information concerns something a competitor would need to know to duplicate the product or make its manufacture more efficient. For example, a list of an employer's customers may be exempt from disclosure because this proprietary information would be of great value to a competitor. Other typical trade secrets pertain to some element of the manufacturing process itself. However, in this instance, the Union did not request information about the manufacturing process. Rather, the Union sought information about the method used to set the production standards.

Stated another way, the Union did not say to Respondent, "Tell us how you make coils." If the Union had made such a request, the Respondent's claim of trade secret would be consistent with the typical pattern. Respondent would be saying, in effect, "if we tell you how we make coils and the information falls into a competitor's hands, the competitor might be able to make its coils faster or more efficiently or more cheaply and take business away from us."

Instead of seeking information about making coils, the Union requested information about another process, the process of setting standards to judge employee performance. Respondent had made it clear that it expected each bargaining unit employee to wind a specified number of coils in a specified period of time and might well discipline any employee whose performance fell below 90 percent of this standard. The Union was asking, in effect, "tell us how you determine the number of coils which you expect an employee to wind in an 8-hour day."

In other words, the Union sought documents directly relevant to how employees would be evaluated—a matter of particular concern to the employees' exclusive bargaining representative—and of less direct relevance to the manufacturing process. Of course, the trade secret doctrine does not protect only proprietary information related to manufacturing processes. If a human resources department had a secret process for doing personnel work and this process gave the employer a competitive advantage, such an employer legitimately could raise a confidentiality concern.

Moreover, in theory at least, information about the method used to determine when an employee should be disciplined for unsatisfactory production arguably might reveal proprietary details of the manufacturing process itself. However, I cannot simply assume that to be the case. Rather, the Respondent bears the burden of demonstrating that the disclosure of information relevant to the discipline of bargaining unit employees would necessitate the revelation of a trade secret.

APPENDIX A

One other point about the Respondent's September 2, 2010 letter should be noted. The letter asserts that the management rights clause of the collective-bargaining agreement gives Respondent the "right to make changes" in the production standards applied to employees. The letter goes on to quote that clause. However, the right to make changes is not at issue here.

The complaint, as amended, does not allege that Respondent made an unlawful unilateral change, but rather alleges that Respondent failed and refused to furnish the Union with requested information which was relevant to the Union's performance of its duties as exclusive bargaining representative and necessary for that purpose. Even assuming that the Union had waived its right to bargain about a change in working conditions, such a waiver does not extend to the Union's statutory right to receive requested relevant and necessary information. Thus, even if an employer has a right to make a change unilaterally, that right does not affect its duty to provide information.

The complaint doesn't allege that Respondent breached its duty to furnish requested information in 2010. However, the Union persisted in requesting information about the production standards and Respondent continued to assert that the requested information was proprietary and a trade secret.

Respondent has admitted the allegation raised in complaint paragraph 8(a), that since about October 14, 2011, the Union has requested orally and in writing that Respondent furnish the Union with the coil time report and the time study report for coil winders. Respondent also has admitted the allegation in complaint paragraph 8(b), that since about October 14, 2011, the Union has requested orally that Respondent furnish the Union with the information necessary to interpret the coil time report.

Respondent has denied that since about May 10, 2012, the Union has requested in writing that Respondent furnish the Union with any and all information used to determine if employees are meeting production standards and any and all policies and/or procedures used by the Company from 2009 to present to determine if an employee should be disciplined for failure to meet production standards. However, the May 10, 2012 request is in evidence as a joint exhibit and I find that the government has proven this allegation.

Similarly, the record establishes that since about June 28, 2012, the Union has requested in writing that Respondent furnish the Union with all information necessary to interpret the coil time report and time study, and any and all information necessary to interpret the production standards, as alleged in complaint paragraph 8(e), and I so find.

Respondent also denies that the requested information is relevant to and necessary for the Union to perform its functions as exclusive representative of bargaining unit employees, as alleged in complaint paragraph 8(f). However, the Union seeks information directly related to the production standards applied to those employees as they perform their jobs. Moreover, the

APPENDIX A

record amply documents disciplinary actions taken against employees for failure to meet the standards. Therefore, I conclude both that the information is presumptively relevant and that Respondent has failed to rebut the presumption of relevance.

> Although the Respondent denies that it has failed to furnish the requested information, as alleged in complaint paragraph 8(g), the record clearly establishes that Respondent has not provided it and continues to assert that it

has no duty to do so because the requested information is proprietary and a trade secret.

One difficulty with Respondent's trade secret argument is that Respondent cannot readily identify the assertedly secret information with any particularity. For example, I specifically asked Respondent's Vice President Koski to identify the trade secret. He gave the following testimony.

JUDGE LOCKE: Uh-huh. What I'm getting at is I'm trying to get my mind around the trade secret or proprietary information assertion or defense. I'm trying to figure out exactly what it is that Howard Industries is afraid will be disclosed. Like, I guess, a trade secret could be a manufacturing process, or it could be a secret ingredient in Coca-Cola or whatever. What is it exactly that you want to protect in this case?

THE WITNESS: Well, it is—first of all, let me just again preface, I am not an engineer. I'm not an engineer. Now—and I'm not intimately familiar with the factors. However, you know, this case is about discipline, and at Coca-Cola, if ten people make Coca-Cola and one of them makes it poor, then the one that made it poor, there's a reason. You don't need the recipe to know that the Coke didn't pass the test. But—so that's, you know, what we're looking at here. Now, as far as what I know that would be proprietary is I know for a fact that because of the fact that we've made our own machines, that they're different than ours, so the speed in which they operate is different than ours. I know that where, you know—I've been asked whether a scissors is an element, how just cutting a piece of paper would be an element. Well, other companies don't cut six pieces of paper. We do. We have six. So the time is: How long does it take to cut the paper? Well, we're cutting for six coils. They're cutting for one. We're using a certain millage paper. I don't know what millage paper they're using, but I suspect that ours is different, because theirs is—like I said, if they're cutting for one, they're cutting for one. That's a

APPENDIX A

period of time. We're cutting for six. It's different, because you have to factor in the time of picking up those scissors, cutting the paper, putting down those scissors. That's the element. Well, if you're picking it up and you're cutting six pieces of paper while you have it up, you've eliminated the time of picking them up and putting them down six times or five other times.

JUDGE LOCKE: Well, how—I guess what I'm getting at is I'm trying to see the connection between withholding the information and the potential that the—some competitor would learn about a process or a secret or something they otherwise would not know that would give it an advantage. And the two aren't connecting in my mind. Perhaps you can help me.

THE WITNESS: Well, first of all, this case is about effectively, in my opinion—I'm not a lawyer either. But in my opinion, this case is about effectively representing employees that have been discharged. I don't see how giving out our trade secrets over how long it takes to cut a piece of paper is going to be beneficial to the union in any way, being that it's one of several hundred to thousand elements. Then in the end, the employee, every single day, gets a quota, and every single day they write down their downtime, and every single day, they turn that in. And that is entered, and that goes onto a report that they get every week in which they can look at it, and every four weeks they can be disciplined for it. But they see the downtime on it. So if the union has the quota that they were assigned, they have the downtime that they received, they have the report that shows the outcome, then they can effectively represent that employee. Now, they can also look at a person who does well. They don't have to just request to look at an efficiency report of somebody that does poorly. Let's look at somebody that does well, that does the same job, so now we can look at it again and we can see that there hasn't been a selection of discipline on an employee. We don't selectively discipline employees. We have an efficiency, and that's what this is about, of course. But the other factors, the downtime, the materials, missing materials, getting materials, ordering materials, buffing materials, all these other things, are just factors that add to those times, so if this case is about us handing over what makes Howard Industries, Howard Industries, because keep in mind the

APPENDIX A

coil is the brain of the operation. The rest of what we do is a steel box filled with oil. All right. So there's a core coil. So if we're going to give away, to represent—he's never going to be able to use that information in a case. It's never going to be, you know, on that day, did you pick up those scissors, and did you cut them. I mean, if it ever gets to that point, arbitrations will take about a year. It's going to come down to the broader strokes, and it always does. So 14 [sic] and I've been in plenty of arbitrations, and I know that I could defend them on the information I've seen on those forms. But anyway, that's where I'm at.

This testimony is too vague to be of much assistance. Another of Respondent's vice presidents, Jack Delk, who is an engineer, gave more precise testimony and from that testimony I conclude that Respondent does not want to disclose its instructions to coil winders regarding how to assemble a coil because Respondent fears a competitor could use this information to "reverse engineer" Respondent's manufacturing process.

However, I found this claim to be quite unpersuasive. Even though Delk was an engineer, he did not explain how a competitor could infer the manufacturing process or the design of the Respondent's machinery from the times allotted to complete various steps of the process.

Delk's testimony boiled down to a claim that if a competitor knew how quickly Respondent could build coils, it would real-

ize that it had to speed up its own operations. That is hardly a trade secret so precious it outweighs the Union's need for the information to represent bargaining unit employees.

If Respondent really wished to protect a trade secret, it would be able to describe it with some specificity. Of course, I do not suggest that Respondent would have to provide so much information about the claimed trade secret that it actually disclosed the secret. Such particularity is not necessary to show that a real secret does, in fact, exist and that it would be of value to a competitor.

However, the frequent repetition of the phrase "trade secret" does not conjure an actual secret into existence. The words, after all, are not pixie dust which would, when scattered about, make a space magical and beyond the usual principles of logic.

In addition to Respondent's inability to identify a specific secret which it seeks to protect, another consideration leads me to reject that claim. The record suggests another reason for Respondent's refusal to furnish the requested information to the Union. The evidence is consistent with the conclusion that Respondent seeks to limit the scope of the Union's arguments in grievance arbitrations, which would reduce the Union's likelihood of success.

APPENDIX A

On a number of occasions, the Respondent discharged or otherwise disciplined employees because their performance supposedly fell short of the production standards. The Union wished to argue that management did not have "just cause," as required by the collective-bargaining agreement, to take these actions. Indeed, in a September 2, 2010 letter to Respondent's human resources vice president, the Union explicitly cited the "just cause" language as a reason for its information request:

> I am aware of the management rights clause. I am also aware of the company's rights to set standards which employees are responsible for meeting. Please be advised that standards are work requirements set by management by which employees will be disciplined for not meeting. Therefore, under the same management rights clause it states that the company shall "make and enforce reasonable rules for the maintenance of discipline; suspend, discharge or otherwise discipline employees for just cause." It is under this proviso that the union is entitle[d] to copy of any standards which necessitates disciplinary action against employees to ensure that such standards are "reasonable."

In representing employees in arbitrations, the Union clearly intended to litigate whether the Respondent's standards were reasonable. Labor relations professionals experienced in arbitrations appreciate that arbitrators would be willing to entertain such an argument and at least some of them would be receptive to it. Arbitrators who hear employment grievances tend to be quite sensitive to issues involving fairness and the perception of fairness. An arbitrator might well consider the contractual "just cause" standard broad enough to justify inquiry into the basis for the production standard: Was the standard arbitrary and draconian, or was it grounded in the amount of production an employee might reasonably be expected to achieve?

If the Union is allowed to raise and litigate such an issue before the arbitrator, it appreciably increases the Union's likelihood of success. On the other hand, if the only issue is whether the grievant's production met the standard set by management, with the fairness of the standard going unchallenged, the Union is more likely to lose. Thus, Respondent would gain a significant advantage by assuring that the Union did not make the fairness of the standard itself an issue during the arbitration. One way to preclude that issue from arising was simply not to provide any information about how Respondent, exercising its authority under the management rights clause, determined what the standard should be.

The testimony of Respondent's human resources vice president, Lauren Koski, is consistent with a conclusion that Respondent believed that the Union merely should litigate whether the grievant met its standard. Rather than furnishing the requested information about the coil winding standards, Koski advocated that Union President Larkin watch employees winding coils. According to Koski, the knowledge gained from such experience would allow the Union to represent employees in grievance proceedings. Thus, Koski testified, in part, as follows:

APPENDIX A

> I think I understand more than Mr. Larkin does, but I would have loved to have gone over there, too. We would have questioned supervision and employees together about their understanding of how they get coils, how they get assigned coils, what they learn—or what they wind, how they write down their downtime, what happens with it. We could have gone through the whole process. That offer was open then; that offer's open today. And if that occurred, then, Mr. Larkin would, in my opinion, be able to effectively learn what he needs to defend a coil winder when they're terminated.

In this testimony, the human resources vice president admits believing that he knows more about the coil winding process than the union president, and the testimony also suggests that he thought he knew better than the union president how to arbitrate a grievance. Koski's further testimony makes clear how Koski thought the Union should present a grievant's case to an arbitrator:

> If what I think, in my opinion, would be the things he would need, which are the daily coil-winding report, that is inclusive of downtime, and then the cumulative, which is a report—the weekly efficiency report is what it's titled, and on that report, it shows each week breakdown, and then a four week average, a 12-week average, and so on, of the individuals' coil-winding efforts, including the downtime that was allowed. You would be able to take those forms, look at the form, see what was assigned to a person, see the downtime, and then you could add those up. You could look at that form and determine what was—what happened and what didn't happen with the weekly efficiency report. In addition to all of that, you could pull a coil winder who is making production and you could look at theirs, and you could see if theirs was different, but we didn't get to explain or do any of these things, because as Mr. Larkin has told me directly, it's a trick that I want him to go over there and learn coil winding. It is not a trick. I expected him to go there to learn, so that he could rep-

resent people.

Koski's testimony, considered together with Larkin's September 2, 2010 letter to Respondent, leaves little doubt about the nature of the conflict. The Union intended to argue that management's production standards were unfair, arbitrary, and insufficient to establish "just cause" for disciplinary action. Respondent, on the other hand, thought the Union should focus on the grievant's production statistics, comparing those numbers with management's standard and also, perhaps, with the production levels of other employees.

Koski made similar statements later in his testimony. However, the Respondent has no right to control its opponent's litigation strategy. Respondent certainly has no right to withhold requested information simply because it did not want the Union to use that information in grievance arbitrations.

APPENDIX A

Moreover, the record establishes that Respondent took no real steps to achieve an accommodation, for example by negotiating a confidentiality agreement or seeking a way to redact the records. Although it paid lip service to this duty, it took no steps in that direction.

In sum, I conclude that the Acting General Counsel has proven the allegations in the complaint, and that Respondent violated Section 8(a)(5) and (1) of the Act, as alleged.

When the transcript of this proceeding has been prepared, I will issue a certification which attaches as an appendix the portion of the transcript reporting this bench decision. This certification also will include provisions relating to the findings of fact, conclusions of law, remedy, order and notice. When that certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout this proceeding, all counsel have demonstrated the highest levels of professionalism and civility, which are truly appreciated. The hearing is closed.

APPENDIX B

NOTICE TO MEMBERS AND EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT fail and refuse to provide the Union, International Brotherhood of Electrical Workers, Local 1317, with information it requests which is relevant to its duties as the exclusive bargaining representative and which is necessary to perform those duties.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL furnish to the Union, without further delay, all information it requested concerning how we set production standards and quotas for our bargaining unit employees.

HOWARD INDUSTRIES, INC.